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No. 06-571

FILED
MAY - 4 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

MICHAEL A. WATSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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Petition for Writ of Certiorari Filed October 23, 2006
Certiorari Granted February 26, 2007

QUESTION PRESENTED

18 U.S.C. § 924(c)(1)(A) criminalizes the "use" of a firearm during and in relation to a drug trafficking offense and imposes a mandatory consecutive sentence of at least five years' imprisonment. In *Bailey* v. *United States*, 516 U.S. 137, 144 (1995), this Court unanimously held that "use" of a firearm under § 924(c)(1)(A) means "active employment." The question presented in this case is:

Whether mere receipt of an unloaded firearm as payment for drugs constitutes "use" of the firearm during and in relation to a drug trafficking offense within the meaning of 18 U.S.C. § 924(c)(1)(A) and this Court's decision in *Bailey*.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the Fifth Circuit (Pet. App. 1a-2a) is not published in the Federal Reporter but is reprinted in 191 Fed. Appx. 326. The district court's decision (Pet. App. 3a–6a) is unreported.

JURISDICTION

The court of appeals entered its judgment on July 25, 2006. The petition for a writ of certiorari was filed on October 23, 2006, and granted on February 26, 2007. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

In pertinent part, 18 U.S.C. § 924(c)(1) provides:

> (A) [A]ny person who, during and in relation to any crime of violence or drug trafficking crime * * * for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> > (i) be sentenced to a term of imprisonment of not less than 5 years;
> >
> > * * * *
>
> (D) Notwithstanding any other provision of law—
>
> > (i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

STATEMENT

This case concerns whether a person who receives an unloaded gun in exchange for drugs but does not actively employ it may be punished for "using" the gun during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1)(A).

1. *Statutory Framework.* As currently in force, 18 U.S.C. § 924(c)(1)(A) authorizes prosecution for three types of conduct: (1) "us[e]" of a firearm "during and in relation to any crime of violence or drug trafficking crime," (2) "carr[ying]" a firearm during and in relation to such a crime, and (3) "possess[ing]" a firearm "in furtherance of any such crime." Convictions under § 924(c)(1)(A) carry severe consequences: for a first offense, a defendant convicted of "us[ing]" a firearm will receive a mandatory minimum sentence ranging from five to thirty years, depending on the type of weapon used.[1] *Id.* § 924(c)(1)(A). The mandatory minimum sentence increases to seven years if the firearm is "brandished" and to ten years if the firearm is "discharged." *Id.* § 924(c)(1)(A)(ii)-(iii). For a "second or subsequent conviction," the penalties increase substantially: Defendants receive a minimum term of twenty-five years of imprisonment, regardless of the type of firearm involved, or a

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[1] If the firearm is a short-barreled rifle or a short-barreled shotgun, the defendant will face a ten-year minimum sentence. If the firearm is "a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler," a thirty-year minimum sentence is mandated. 18 U.S.C. § 924(c)(1)(B).

life sentence "if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler." *Id.* § 924(c)(1)(C).

These mandatory sentences are distinct from and in addition to all other sentences, including those for the predicate crime of violence or drug trafficking offense. See 18 U.S.C. § 924(c)(1)(D). The statute expressly prohibits courts from either sentencing a defendant to probation in lieu of the prescribed term of imprisonment or suspending a § 924 sentence. It also directs that the sentence must be served consecutively, not "concurrently with any other term of imprisonment." 18 U.S.C. § 924(c)(1)(D).[2]

This Court has twice considered what constitutes "us[e]" under § 924(c)(1)(A). In *Smith* v. *United States*, 508 U.S. 223 (1993), a divided Court held that trading a gun to buy drugs constitutes such "use." Construing the word "use" first "in accord with its ordinary or natural meaning," *id.* at 228, and then against the background of related statutory provisions, *id.* at 233-237, this Court rejected the argument that § 924(c)(1)(A) criminalizes "use" of a gun only as a weapon. The Court emphasized that a defendant who trades a gun for

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[2] Defendants convicted of § 924(c)(1) offenses who also qualify as "career offenders" under section 4B1.1 of the United States Sentencing Guidelines face sentences well exceeding the statutory mandatory minimum terms of imprisonment. If a defendant is convicted of a felony classified as either a crime of violence or a controlled substance offense and has at least two prior felony convictions for such offenses, he qualifies as a career offender. See U.S.S.G. § 4B1.1(a). If such a defendant is convicted of a count under 18 U.S.C. § 924(c), the Guidelines prescribe a sentencing term that, at minimum, ranges from 262 to 327 months. See U.S.S.G. § 4B1.1(c)(3). Only those defendants who accept responsibility for the offense and timely notify government officials of their intent to enter a guilty plea are entitled to that minimum sentencing range, however. *Ibid.*; *id.* § 3E1.1. When the defendant elects to plead not guilty but is convicted at trial, the court must impose a minimum sentence of 360 months to life imprisonment. *Id.* § 4B1.1(c).

drugs has "used" the weapon within the "everyday meaning of that term," and noted the danger that the individual who brought the weapon with him, for use as "currency" might instead "convert[it] * * * to cannon." 508 U.S. at 228.

In *Bailey* v. *United States*, 516 U.S. 137 (1995), this Court, in a unanimous opinion written by the author of the majority opinion in *Smith*, firmly rejected a broad reading of "use" and of the Court's earlier decision. Starting again with the word's "ordinary or natural meaning," *id.* at 145, and then considering "its placement and purpose in the statutory scheme," *ibid.*, this Court held that "use" under § 924(c)(1)(A) "requires evidence sufficient to show an *active employment* of the firearm by the defendant." 516 U.S. at 143 In particular, it held, a defendant's possession of a gun to facilitate or embolden illegal drug-dealing could not support a conviction under the "use" prong of § 924(c)(1). 516 U.S. at 149. Although it might not be linguistically impossible under such circumstances to describe the defendant as "using" the gun for protection, *Bailey* explained, the text and structure of the statute made clear that § 924(c)(1) did not reach such "nonactive" "uses." 516 U.S. at 149. "[W]ithout [a gun's] more active employment, ["use"] is not reasonably distinguishable from possession," which, the Court emphasized, the statute clearly did not criminalize. *Ibid.*

2. *Proceedings Below.* Petitioner Michael Watson, a legally blind fifty-five-year-old man (PSR ¶ 66), sought to purchase a firearm in order to protect himself and his property against robbery and theft. Pet. App. 9a. In November 2004, Watson discussed with a government informant his interest in buying a gun. *Ibid.* When Watson asked about the cost, the informant replied that he did not know a cash price, but that he would instead introduce Watson to an individual who would provide him with a firearm in exchange for drugs. *Ibid.*

On November 12, 2004, the informant brought that individual—an undercover government agent—to Watson's home in Ascension Parish, Louisiana. Gov't C.A. Br. 5. Watson provided the undercover agent with twenty-four dosage units of oxycodone hydrochloride, also known as OxyContin. Pet. App. 9a. Although he held prescriptions for this medication, Watson later explained to the agents that his financial circumstances were so precarious that he sometimes had to sell his medication. *Id.* at 10a. In exchange for the pills, the government agent provided Watson with an unloaded pistol. *Ibid.* Immediately upon conclusion of the transaction, the agent arrested Watson. *Id.* at 9a.

Federal prosecutors brought a three-count indictment against Watson in the United States District Court for the Middle District of Louisiana. In addition to charging him with distributing a Schedule II controlled substance, see 21 U.S.C. § 841, and possessing a firearm as a convicted felon, see 18 U.S.C. § 922(g), the indictment accused him of violating § 924(c) by "using" the gun during and in relation to a drug trafficking offense—*i.e.*, the November 12 barter. J.A. 7-9. The parties ultimately entered into a plea agreement upon stipulated facts. Pet. App. 7a-11a. Under the terms of the agreement, Watson pleaded guilty to all counts, but reserved the right to appeal whether, as a matter of law, the stipulated facts could support a conviction for firearm "use." Pet. App. 7a-8a; J.A. 11-20. Specifically, Watson maintained the right to challenge whether passive receipt of a firearm in exchange for drugs constitutes "use" of the firearm within the meaning of § 924(c)(1)(A). Pet. App. 7a.

The district court accepted the plea agreement, concluding that under Fifth Circuit precedent the stipulated facts sufficed to support Watson's conviction. J.A. 19-20. Accordingly, the district court, while treating the guilty plea to the § 924(c)(1)(A) charge as a conditional plea under Federal Rule of Criminal Procedure 11(a)(2), entered a judgment of conviction on all counts.

At sentencing, the district court, citing Watson's two prior convictions (both more than 15 years old), PSR ¶¶ 50-51; 11/17/05 Tr. 14, pronounced him a "career offender" for Sentencing Guidelines purposes. See U.S.S.G. § 4B1.1(a); note 2, *supra*. Under the applicable Guidelines, the § 924(c)(1) conviction required an overall sentence between 262 and 327 months, PSR ¶ 85; see U.S.S.G. § 4B1.1(c)(3), significantly more than the 151-188 months required had he been convicted only on the drug and firearm possession counts. The court imposed a sentence at the low end of that range—262 months (nearly 22 years)—reflecting concurrent sentences of 202 months and 120 months, respectively, on the drug and gun-possession offenses, plus the statutory minimum, consecutive sentence of 60 months for the § 924(c)(1)(A) conviction. Pet. App. 6a.

Watson timely appealed his conviction for the § 924(c)(1)(A) violation. As contemplated by the plea agreement, the appeal raised only whether mere receipt of a gun was insufficient as a matter of law to support his conviction for "use" of a firearm during and in relation to a drug trafficking offense. Pet. C.A. Br. 2.

In an unpublished opinion, the Fifth Circuit held that it was bound to follow circuit precedent established in *United States* v. *Ulloa*, 94 F.3d 949 (5th Cir. 1996), and *United States* v. *Zuniga*, 18 F.3d 1254 (5th Cir. 1994), both of which had upheld convictions under § 924(c)'s "use" prong for receiving guns in exchange for drugs.[3] Pet. App. 2a.

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[3] In *Zuniga*, the Fifth Circuit rejected as foreclosed by *Smith* the defendants' argument that their receipt of firearms in exchange for drugs could not be punished as "use" within the meaning of § 924(c)(1). See 18 F.3d at 1258. In *Ulloa*, 94 F.3d at 956, the court adhered to that conclusion after rejecting the argument that passive receipt did not constitute the requisite "active employment" under this Court's intervening decision in *Bailey*. But see *Ulloa*, 94 F.3d at 958 (Politz, C.J., dissenting).

SUMMARY OF ARGUMENT

Section 924(c)(1) imposes mandatory, consecutive sentences of at least five years' (and up to life) imprisonment on any person who "uses" a firearm "during and in relation to" a drug-trafficking offense. In *Smith* v. *United States*, 508 U.S. 223 (1993), and *Bailey* v. *United States*, 516 U.S. 137 (1995), this Court held that the statutory term "use" should be given its ordinary and natural meaning. In *Bailey*, the Court further explained that a defendant "use[s]" a firearm only if he "active[ly] employ[s]" it. *Id.* at 143. Because Watson did not "use" the firearm in any ordinarily recognizable sense of that word—let alone "actively employ" it—his conviction must be reversed.

I. Statutory interpretation begins with the language of the statute Congress enacted, and the plain meaning of "use" in § 924(c)(1) is dispositive here. It is wholly unnatural to say that a person "uses" an object simply by receiving it, and it is impossible to describe receipt as "active employment," as *Bailey* held § 924(c)(1) requires. A person in Watson's position, who does nothing more than receive a gun as payment, has neither "employed" the firearm nor engaged in "active" conduct. The text and structure of the surrounding and related statutory provisions—and the structure, history, and purposes of the overall statutory scheme—abundantly confirm the plain meaning of § 924(c)(1). All make clear that, in enacting § 924(c)(1)'s "use" prong, Congress provided for punishment only of those who actively employ firearms in drug transactions (as this Court held in *Bailey*), not those who merely receive (or attempt to receive) firearms by trading drugs.

II. Although a number of lower courts have, like the Fifth Circuit below, held that individuals who trade drugs *for* guns may be convicted of firearm "use" in violation of § 924(c)(1), none has suggested that such a result is actually consistent with, much less compelled by, the text of the statute. To the

contrary, several of these decisions have forthrightly acknowledged the incompatibility of their rule with § 924(c)(1)'s plain meaning. Those courts nonetheless have concluded that mere receipt may be punished as "use," relying on perceived policy concerns as well as on certain snippets of language in this Court's *Bailey* opinion.

Neither rationale is valid. Even if it were ever permissible (despite the rule of lenity) to enlarge a criminal statute for policy reasons, there is no reason to do so here. Construing the statute as written makes complete sense, particularly in light of the consistent legislative judgments the statute reflects. Equally troubling is the lower courts' misplaced reliance on certain language in *Bailey* torn from its proper context—specifically, this Court's reference to the requirement that a defendant's active employment (*i.e.*, "use") of a firearm *also* be an "operative factor" in the underlying offense and its recognition that, under *Smith*, "bartering * * * a firearm" qualifies as a "use." Properly interpreted and understood in their context, these aspects of the *Bailey* opinion provide no support whatsoever for the Fifth Circuit's holding. Beyond that, reliance on these snippets of language simply misses the forest for (a couple of) the trees. In *Bailey*, after all, this Court *rejected* a construction of "use" that was *narrower* and *more plausible* than the one accepted by the Fifth Circuit below. The lower courts that have equated *Bailey*'s definition of "use" with participation in any transaction in which the gun is an "operative factor" overlook the central thrust of this Court's unanimous opinion. Thus, *Bailey* cannot reasonably be read as in any way intimating that obtaining or seeking to obtain a gun through barter is "use" of the firearm.

III. Even if the ordinary meaning of § 924(c)(1) did not foreclose the Fifth Circuit's interpretation, at the very least petitioner's interpretation is a reasonable one triggering the rule of lenity. That rule serves important constitutional values. It ensures that legislatures define substantive crimes,

and that individuals are provided with fair warning concerning the scope of penal statutes. Congress easily could have made receipt of a firearm as consideration in a drug transaction punishable as "use" under § 924(c)(1), but it did not do so, and—far from giving "fair notice"—the statutory language Congress actually enacted sends a clear signal that such activity does *not* fall within the provision's sweep.

ARGUMENT

I. MERE RECEIPT OF A FIREARM IN EXCHANGE FOR DRUGS IS NOT "USE" UNDER 18 U.S.C. § 924(C)(1)

By receiving a gun as payment for drugs, Watson did not "use" that firearm within the meaning of 18 U.S.C. § 924(c)(1). In *Smith*, this Court made clear that the term must be given its ordinary and natural meaning, and, under any reasonable or linguistically coherent reading of the term, a seller does not *use* a buyer's consideration simply by *receiving* it. In *Bailey*, this Court further explicated Congress's intent in § 924(c)(1), unanimously holding that even certain activities that might ostensibly be cast as "uses"—*e.g.*, a defendant's keeping a gun present to facilitate drug selling—are beyond the reach of the statute. The Court held that the Government may not rely on proof that the defendant brought a gun with him and that the gun's accessibility facilitated drug trafficking; rather, it must "show an *active employment* of the firearm by the defendant." *Bailey*, 516 U.S. at 143. "Use," according to *Bailey*, implies "action and implementation," *id.* at 145, and the "inert presence of [a defendant's] firearm," *id.* at 149, during the drug transaction is not enough. Simple receipt of a gun in exchange for drugs—a quintessentially passive event in which the recipient does nothing more than take possession of an object—falls far short of the "active employment" demanded by *Bailey*.

In addition to betraying the plain language of § 924(c)(1), equating "receipt" with "use" is utterly inconsistent with the structure, purposes, and history of § 924(c)(1), and with the larger statutory scheme in which § 924(c)(1) operates. Congress has carefully and consistently distinguished between "use" and "receipt" in myriad other criminal statutes governing weapons transactions, and, consistent with those guideposts, *Bailey* explicitly and decisively rejected the contention that § 924(c)(1)'s "use" prong criminalizes every combination of drugs and guns. *Bailey*, 516 U.S. at 149-150. Particularly in a statute aimed at discouraging individuals' active employment of guns during drug crimes—typically, the inherently dangerous "use" of a gun as a means to an often violent end—the statute's plain meaning cannot and may not be stretched to cover receipt.

A. As A Matter Of Ordinary Meaning, "Use" Does Not Encompass The Mere Receipt Of A Firearm

In this case, not only "must [the analysis] begin * * * with the language of the statute itself," but it is "also where the inquiry should end." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); see *ibid.* ("[W]here * * * the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'") (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)). In each of three recent decisions interpreting 18 U.S.C. § 924(c)(1), this Court has emphasized that the language Congress enacted in that provision should be given its ordinary and natural meaning. See *Smith*, 508 U.S. at 228 ("[W]e normally construe [a statutory word] in accord with its ordinary or natural meaning."); *Bailey*, 516 U.S. at 145 ("[t]he word 'use' in the statute must be given its 'ordinary or natural' meaning") (quoting *Smith*); *Muscarello* v. *United States*, 524 U.S. 125, 128 (1998) (same with regard to "carry" prong of § 924(c)(1)); see generally *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the

assumption that the ordinary meaning of that language accurately expresses the legislative purpose."). That principle is dispositive here.

It is neither "reasonable" nor "normal," *Smith*, 508 U.S. at 230, to say that a person has "used" an object merely by receiving it. Indeed, the government's theory of criminal liability in this case fails what all Justices in *Smith* agreed was the threshold inquiry: whether the particular conduct could "be described as 'use' within the everyday meaning of that term." See *id.* at 228.[4]

As several courts of appeals have vividly illustrated, a buyer perhaps "uses" his own payment as a medium of exchange, see *Smith*, 508 U.S. at 229, but the seller's receipt of that payment does not constitute the seller's "use" of the payment. Thus, the Seventh Circuit has explained that "passively receiving a gun from an undercover agent in payment for drugs cannot constitute a use under section 924(c)(1)":

> When we consider, as did the Supreme Court in both *Bailey* and *Smith*, the ordinary or natural meaning of the word "use," we note that there is no grammatically correct way to express that a person receiving a payment is thereby "using" the payment. * * * If [the agent] had paid for the gun with a $100 bill, we would not say that [the defendant] "used" $100 in selling his gun[.] * * * *A seller does not "use" a buyer's consideration.* The only person actively employing the gun in this transaction is the government agent.

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[4] Although the dissenting Justices in *Smith* argued that this test was *insufficient* in itself to delimit the class of activity Congress intended § 924(c)(1) to proscribe, 508 U.S. at 242-43 (Scalia, J., dissenting), they did not suggest that the inquiry was *unnecessary*, *i.e.*, that conduct that could not be described even as ordinary "use" might still be subject to punishment.

United States v. *Westmoreland*, 122 F.3d 431, 435-436 (1997) (Rovner, J., joined by Posner, C.J., & Evans, J.) (emphasis added).

Similarly, the D.C. Circuit in *United States* v. *Stewart*, 246 F.3d 728, 731 (2001) (Sentelle, J., joined by Williams & Rogers, JJ.), explained that, as a matter of ordinary English usage, the word "use" does not describe receipt of an item in a barter exchange. Judge Sentelle there observed that, "when a person pays a cashier a dollar for a cup of coffee in the courthouse cafeteria, the customer has not used the coffee. He has only used the dollar bill." *Ibid.* Thus, "[c]onsistent with the 'ordinary meaning' approach employed by the Supreme Court in *Smith* and *Bailey*, we cannot see how a defendant 'uses' a gun when he receives it during a drug transaction." *Ibid.*

Even courts that ultimately have held that receipt of a firearm *can* support liability under § 924(c)(1) have acknowledged that the grammatically sensible reading of the statute supports the opposite result. For example, the First Circuit recently confessed that,

> while it is easy to see how [the defendant] "used" the heroin to get the guns, it is somewhat less natural to say that he "used" the guns as well. Were we writing on a blank slate, we might well be inclined to say, based on the most natural reading of the statute, that [the defendant] did not "use" the guns by bartering for them.

United States v. *Cotto*, 456 F.3d 25, 28 (1st Cir. 2006) (citations omitted), petition for certiorari pending (U.S. S. Ct. No. 06-8168). Likewise, the Third Circuit readily acknowledged the "forceful argument * * * [that] 'there is no grammatically correct way to express that a person receiving a payment is thereby "using" the payment.'" *United States* v. *Sumler*, 294 F.3d 579, 583 (3d Cir. 2002) (quoting

Westmoreland, 122 F.3d at 435). Although both of those decisions upheld § 924(c)(1) liability for other (erroneous) reasons (see pp. 27-39, *infra*), both candidly admitted what should be dispositive of the question presented here: The ordinary and natural reading of "use" does not bring receipt of a firearm in a drug transaction within the ambit of § 924(c)(1).

Moreover, the very same sources the *Smith* majority pointed to in upholding the defendant's conviction in that case—standard dictionary definitions—compel reversal here. To determine whether the defendant had "used" a firearm, the *Smith* Court asked whether "he 'employed' it" or "'derived service' from it." 508 U.S. at 229 (citing *Webster's New International Dictionary* 2806 (2d ed. 1950); *Black's Law Dictionary* 1541 (6th ed. 1990)); see also *Bailey*, 516 U.S. at 145 (describing *Smith*'s understanding of "use" as the word's "ordinary or natural" meaning) (citing same). Other dictionary definitions of "use" agree, emphasizing that a person "uses" an item by applying it instrumentally. See, *e.g.*, 19 *The Oxford English Dictionary* 353 (2d ed. 1991) ("To employ or make use of (an article, etc.), esp. for a profitable end or purpose; to utilize, turn to account."); *Random House Dictionary of the English Language* 2097 (2d unabridged ed. 1987) ("to employ for some purpose; to put into service; make use of"). The common thread running through these definitions is that a person who "uses" something personally applies it toward the achievement of a goal. See generally Clark D. Cunningham & Charles J. Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretation of "Use a Firearm,"* 73 Wash. U.L.Q. 1159, 1176 (1995) ("Expressions of the form 'W used X' express an idea more fully stated in the form 'W used X as Y to do Z.' X served an instrumental function, Y, in some purposeful activity, Z, in which W was engaged.").

The holding of *Smith* is consistent with those principles. In an ordinary conversation, one would not find it a

particularly surprising use of language to say, "My buddy used his gun to buy some drugs." Yet it would be linguistically startling to hear someone say, "My buddy used a gun by receiving it for drugs." In ordinary usage, the "use" is what may happen *after* the receipt, not the receipt itself.

Here, Watson cannot be said to have "us[ed]" the firearm provided by the undercover government agent merely because Watson received it in exchange for drugs. His receipt of the firearm did not entail applying it as an instrument toward the accomplishment of some *other* aim. Cf *Smith*, 508 U.S. at 229 (The defendant "'used' or 'employed' it as an item of barter to obtain cocaine; he 'derived service' from it because it was going to bring him the very drugs he sought."). Nor, of course, does the possibility that Watson may have *intended* to use the gun *after* he received it (that is, to utilize it in the future) affect the analysis—he did not employ it or derive service from it "during and in relation to" the drug transaction itself, as § 924(c)(1) expressly requires. See also pp. 23-24, *infra* (discussing § 924(d)(1), which authorizes seizure of firearms "intended to be used" for certain crimes).

B. Mere Receipt Involves No "Active Employment," As *Bailey* Requires

Construing simple receipt in a barter transaction as "use" fails to satisfy the requirements this Court unanimously announced in *Bailey*. *Bailey* rejected the claim, advanced by the government and adopted by several lower courts, that every combination of firearms and drug trafficking was punishable under § 924(c)(1) and that any conduct that might possibly be described as "use"—including possession of a gun, the presence of which "emboldens" a defendant's drug trafficking activities, 516 U.S. at 149—would support conviction. The problem with convicting a defendant who "uses" a gun for protection (*e.g.*, one who brings a gun with him for self-defense), the Court explained, is that it would obscure distinctions that Congress intended to maintain

between "use" and "possession"; between actual and "intended use"; and between "carrying" a gun and "using" it. *Id.* at 149-150. The way to respect those legislative judgments, the Court held, was to construe "use" as restricted to conduct entailing "active employment of the firearm." *Id.* at 143.

Reversal here follows *a fortiori* from *Bailey*. First, as explained above, it is even less natural than in *Bailey* to describe Watson's conduct as "use" of the gun. Moreover, if, as *Bailey* unanimously held, defendants who bring loaded guns to drug transactions and whose possession facilitates their criminal acts cannot be punished under § 924(c) for "use," then defendants in Watson's position, who either are arrested before ever obtaining a gun or who momentarily hold government-provided, unloaded guns under carefully controlled circumstances, may certainly not be punished as firearms "users." The concerns that had led lower courts to balk at the "active employment" limitation the *Bailey* Court emphatically embraced—*e.g.*, the ever-present danger that the defendant who brings a gun to a drug deal will put it to destructive use—are almost entirely absent when individuals like Watson come to the transaction unarmed, carrying only drugs they hope to use to obtain a gun. When a person does nothing more than receive a gun as payment for drugs in a bartering exchange, that person has neither employed the gun nor engaged in active conduct.

To punish mere receipt as "use" is to ignore a central teaching of *Bailey*: Congress did not mean for "use" to reach mere *possession*, even when such possession was highly dangerous and directly related to the defendant's drug offenses. The D.C. Circuit decision reversed in *Bailey* had acknowledged that "mere possession" could not be prohibited "use," *United States* v. *Bailey*, 36 F.3d 106, 110 (1994) (en banc), but had then held, as had many other appellate courts, that it was permissible to punish defendants whose possession involved something more. See *id.* at 118 ("When there is

evidence of proximity and accessibility, we will affirm a conviction under § 924(c)(1)"); *United States* v. *Long*, 905 F.2d 1572, 1576 (D.C. Cir. 1990) (Thomas, J.) (documenting that "[t]he word ['use'] has been losing its conventional, active connotation for some time," noting decisions holding that "defendant can 'use' a firearm without actively employing it," – *e.g.*, "simply by possessing [guns] in the vicinity of drugs"). This Court concluded that such limitations did not adequately respect Congress's decision not to bring "possession" within the "use" prohibition, citing both the difficulty of drawing lines in cases where "facilitative" or "emboldening" possession was alleged and the likelihood that, as a practical matter, any line between "mere possession" and "possession plus" would be breached. As the Court explained:

> Where the Court of Appeals erred was not in its conclusion that "use" means more than mere possession, but in its standard for evaluating whether the involvement of a firearm amounted to something more than mere possession. Its proximity and accessibility standard provides almost no limitation on the kind of possession that would be criminalized; in practice, nearly every possession of a firearm by a person engaged in drug trafficking would satisfy the standard, "thereby eras[ing] the line that the statutes, and the courts, have tried to draw"

516 U.S. at 143-144 (quoting *United States* v. *McFadden*, 13 F.3d 463, 469 (1st Cir. 1994) (Breyer, C.J., dissenting)); 516 U.S. at 144 ("An evidentiary standard for finding 'use' that is satisfied in almost every case by evidence of mere possession does not adhere to the obvious congressional intent to require more than possession to trigger the statute's application."). Indeed, receipt of a firearm is, by definition, *preliminary to* possession of a firearm, making receipt even more attenuated and removed from the conduct *Bailey* held did not support § 924(c)(1) liability.

Bailey established a firm boundary to give effect to Congress's distinction between "possession" and "use," limiting the latter to cases where the government could show "active employment" of the firearm. The conduct at issue here—receipt of a gun in a barter exchange—does not constitute "employment," much less "active" employment. Employment of a gun requires that one apply it toward some end. See 5 *The Oxford English Dictionary* 191 (2d ed. 1991) (defining "employment" as "[t]he action or process of employing; the state of being employed"). When a person receives a gun as payment for drugs, he has not personally "appl[ied the gun] to some definite purpose" or "use[d it] as a means or instrument"—in fact, he has not applied it at all. See *Westmoreland*, 122 F.3d at 436 ("Without * * * employment, and with a showing that [defendant] merely held the gun for a moment after a government agent handed it to him and before he was arrested, we cannot sustain the conviction."). Because petitioner's conduct in this case does not square with the meaning of "employment," petitioner has not "used" the gun.

Bailey further held that § 924(c)(1)'s prohibition of gun "use" requires "*active* employment" by the defendant; inherently *passive* activity does not suffice. Even if Watson somehow could be said to have "employed" the gun handed him by law enforcement, his conduct was quintessentially passive—more so than the facilitating and emboldening possession held insufficient as a matter of law in *Bailey*. As the Seventh Circuit explained in *Westmoreland*, "[n]o matter how we phrase the events in this transaction, the defendant is on the passive side of the bargain. He received the gun. He was paid with the gun. He accepted the gun. But in no sense did he *actively* 'use' the gun." 122 F.3d at 435 (emphasis added); see also *id.* at 436 ("The evidence presented at trial demonstrated, at best, that [the defendant] *passively* accepted the gun from a government agent in payment for drugs, and then was immediately arrested.") (emphasis added).

Similarly, the Seventh Circuit rejected the government's suggestion that the defendant's brief "display" of the gun he received from government agents during the time "it took for backup agents to be alerted to approach and make the arrest" constituted active employment of the firearm." *Ibid.* "[A]t that point in the transaction," the court explained, "the gun was nothing more than the 'inert presence' described in *Bailey*. A government agent had supplied an inoperable, unloaded gun to the defendant in place of currency." *Ibid.* The same is true here: the government agent supplied an unloaded firearm to Watson, who was promptly arrested.

This Court has relied on the distinction between active and passive conduct in other cases interpreting the word "use." In *Jones* v. *United States*, 529 U.S. 848 (2000), for example, the Court was asked to decide whether arson of a private residence constitutes destruction of property "*used* in interstate or foreign commerce." *Id.* at 850 (quoting 18 U.S.C. § 844(i) (emphasis added). The Court held that the "use" qualification in § 844(i) "is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce." *Id.* at 855 (citing *Bailey*, 516 U.S. at 143, 145). Based on that understanding of "use" in § 844(i), the Court noted that "[i]t is surely not the common perception that a private, owner-occupied residence is 'used' in the 'activity' of receiving natural gas, a mortgage, or an insurance policy." *Id.* at 856. To qualify as property "used" in interstate commerce, the home itself had to be actively employed in interstate commerce, *e.g.*, by being used as a home office for an interstate commercial enterprise. See *ibid.* Likewise here, because the receipt of a gun as payment for drugs bears only a passive connection to the gun itself, the recipient's conduct cannot be characterized as active, and therefore cannot be "use" under *Bailey*.

C. Congress's Omission Of The Terms "Possession" And "Receipt" From § 924(c)(1)'s "Use" Prong Further Demonstrates The Lower Court's Error

In *Bailey*, this Court rejected the proposition that possession of a firearm constitutes "use" of that firearm under § 924(c)(1), in part because, "[h]ad Congress intended possession alone to trigger liability under § 924(c)(1), it easily could have so provided." 516 U.S. at 143. *Bailey* emphasized that Congress frequently employed the term "possess" in other statutes to describe prohibited gun-related conduct, *ibid.* (citing, *inter alia*, 18 U.S.C. § 922(g), (j), & (k)), and recognized that its failure to do so in § 924(c)(1) carried significance. Had Congress wanted to criminalize the expansive range of conduct the government argued for, the Court explained, "it could have simply substituted a more appropriate term—'possession'—to cover the conduct it wished to reach." 516 U.S. at 148.[5]

Like the term "possess," the term "receive" is used to describe prohibited gun-related conduct in numerous other federal statutes, including many of the same ones this Court cited in *Bailey*. For example, 18 U.S.C. § 922(g) prohibits certain persons from "*receiv[ing]* any firearm or ammunition which has been shipped or transported in interstate * * * commerce" and from "*possess[ing]* [a firearm] in or affecting commerce." 18 U.S.C. § 922(g) (emphasis added). Similarly, § 922(k) makes it unlawful for "any person * * * to *possess* or *receive* any firearm" that has had the serial number removed. 18 U.S.C. § 922(k) (emphasis added). Many other statutory provisions include language explicitly prohibiting

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[5] Notably, after this Court's decision in *Bailey* stating that mere possession of a firearm during and in relation to a drug trafficking crime does not constitute "use" of that firearm, Congress amended § 924(c)(1)(A) to prohibit "possess[ion of] a firearm * * * in furtherance of any such crime." Congress did not, however, disturb the meaning of "use" or add any prohibition against receipt of a firearm. See 18 U.S.C. § 924(c)(1)(A) (2000). See pp. 22-23, *infra*.

receipt of a firearm. See, *e.g.*, 18 U.S.C. §§ 922(a)(1) (barring certain persons from "receiv[ing] any firearm in interstate or foreign commerce"), 922(a)(3) (barring certain persons from "receiv[ing] in the State where [they] resid[e] * * * any firearm * * * obtained by such person[s] outside that State" subject to specified exceptions), 922(a)(9) (barring certain persons from "receiv[ing] any firearms unless such receipt is for lawful sporting purposes"), 922(l) (barring certain persons from "knowingly * * * receiv[ing] any firearm" that has been illegally imported), 922(n) (barring indicted felons from "receiv[ing] any firearm * * * which has been shipped * * * in interstate or foreign commerce"), 922(p)(1) (barring persons from "receiv[ing] any firearm" that makes security detection sufficiently difficult). Indeed, Congress criminalized receipt of a firearm in § 924(b)—the subsection immediately preceding the provision at issue here—by prohibiting the receipt of a firearm with intent to commit an offense punishable by more than one year in prison. To paraphrase this Court's conclusion in *Bailey*, had Congress intended to criminalize receipt of a gun under the statute, it could have simply used a more appropriate term—"receive"—to cover the conduct it wished to reach.

D. Congress's Frequent Proscription of Both "Use" And "Receipt" In Other Criminal Statutes Confirms That "Use" Does Not Cover Mere "Receipt"

That Congress did not intend § 924(c)(1) to reach simple receipt is confirmed by Congress's explicit proscription of both "use" and "receipt" in other criminal statutes. For example, 15 U.S.C. § 1644(d) imposes a prison sentence of up to ten years upon anyone who "knowingly *receives*, conceals, *uses*, or transports" anything of value that has been obtained through credit card fraud. 15 U.S.C. § 1644(d) (emphasis added). Presumably, that statute would cover both those who *used* such items by bartering for something else, cf. *Smith*, 508 U.S. at 241, and those who *received* them through

barter transactions (or any other type of transaction) knowing they had been obtained through credit card fraud. In particular, Congress has separately criminalized both "use" and "receipt" of items and substances that pose exceptional danger. See, *e.g.*, 18 U.S.C. §§ 175c(a)(1) (criminalizing the "recei[pt]" or "use" of variola, the virus that causes smallpox), 229(a)(1) (criminalizing the "recei[pt]" or "use" of chemical weapons), 831(a)(1) (criminalizing the "recei[pt]" or "use" of nuclear materials), 2332g(a) (criminalizing the "recei[pt]" or "use" of heat-seeking missiles used to destroy aircraft), 2332h(a)(1) (criminalizing the "recei[pt]" or "use" of radiological dispersal devices). Thus, Congress is well aware of the distinction between "use" and "receipt."

Likewise, Congress has consistently recognized the difference between "acquisition" of an item and its "use." See, *e.g.*, Gun Control Act of 1968, Pub. L. No. 90-618, § 101, 82 Stat. 1213-14 (declaring its purpose to be the protection of "law abiding citizens with respect to the *acquisition, possession, or use* of [certain] firearms") (emphasis added); see also 22 U.S.C. § 2573(c) (same). And 42 U.S.C. § 5651(a)(19) authorizes grants to States "to reduce the unlawful acquisition and illegal use of guns by juveniles." That distinction runs throughout the United States Code. See, *e.g.*, 7 U.S.C. § 2024(b)(1) ("[W]hoever knowingly *uses*, transfers, *acquires*, alters, or *possesses* [food stamp program] coupons, authorizations cards, or access devices shall * * * be guilty of a felony.") (emphasis added); 16 U.S.C. § 1853a(c)(5)(D)(i) (requiring regulatory consideration of a maximum share that "a limited access privilege holder [for a managed fishery] is permitted to *hold, acquire, or use*") (emphasis added).[6]

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[6] Similarly, myriad statutes emphasize that real or other property is acquired for later use, not used by being acquired. See, *e.g.*, 2 U.S.C. § 2002(a) ("Chief Administrative Officer of the House of Representatives may acquire buildings and facilities * * * for the use of the House of Representatives."); 25 U.S.C. § 488 (authorizing loans "to any Indian tribe

By contrast, the plain language of § 924(c)(1) makes clear that its stiff, additional sentences should apply only to defendants who actually "used" (as opposed to merely "received" or "acquired") a firearm during a drug trafficking offense.

E. Statutory Provisions Adjacent To The "Use" Prong Of § 924(c)(1)—The 1998 Amendment To § 924(c)(1) And The Forfeiture Provisions In § 924(d)—Further Show That "Use" Does Not Reach Mere Receipt

An expansive view of § 924(c)(1)'s "use" prong is also at odds with neighboring provisions within § 924. First, enlarging the term "use" to accommodate mere receipt would contravene the import of Congress's 1998 amendment to § 924(c)(1) in response to this Court's decision in *Bailey*. Although Congress extended § 924(c)(1)'s reach, it carefully left the statute's "use" provision untouched, ratifying this Court's limitation of that term's reach in *Bailey*. Rather, Congress added language criminalizing "possession" of a gun "in furtherance of" a drug trafficking crime. Indeed, Congress rejected a proposal by the Department of Justice that would have repealed the "uses or carries" language and substituted a simple "possession" standard. H.R. Rep. No. 105-344, at 14 (1997). Congress instead added the modifier "in furtherance of" to impose "a slightly higher standard" than the "during and in relation to" standard set out in the "use" and "carry" prongs. *Id.* at 11; see also *ibid.* (defining "furtherance" as "the 'act of furthering, helping forward, promotion, advancement, or progress.'") (citing *Webster's*

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* * * to acquire lands * * * for use of the tribe"). Other statutes authorize acquisition of land or objects in circumstances where it would be absurd to say that one "used" the land or object simply by acquiring it. For example, 10 U.S.C. § 9773(e) authorizes the Secretary of the Air Force to "acquire at desired locations bombing and machine gun ranges necessary for practice by, and the training of, tactical units." It would be bizarre, however, to say the Secretary "uses" a bombing range by acquiring it.

New International Unabridged Dictionary 1022 (2d ed. 1950) and *Black's Law Dictionary* 675 (6th ed. 1990)). The view of "use" adopted by the court of appeals below, then, reaches conduct that congressional committees specifically considered and Congress declined to criminalize when amending § 924(c)(1) in response to *Bailey*.

Second, § 924(d) supports a narrow definition of "use" of a firearm under § 924(c)(1). Section 924(d) authorizes the seizure and forfeiture of firearms that are "involved in or used in" violations of certain federal laws, as well as firearms that are "intended to be used" in a separate, but partially overlapping, range of offenses. See 18 U.S.C. §§ 924(d)(1), 924(d)(3). As both *Smith*, 508 U.S. at 233-234, and *Bailey*, 516 U.S. at 146, recognized, § 924(d) may shed some light on the meaning and scope of "use" under § 924(c)(1). Congress's carefully crafted language in § 924(d) demonstrates that Congress attached significance to the distinctions between the relatively broad "involved in or used in" language in § 924(d) and the precise, narrower term "use" in § 924(c)(1).

The statutory language employed by Congress in the first portion of § 924(d), providing for the seizure and forfeiture of a gun "involved in or used in" certain crimes, reflects Congress's understanding that "use" of a gun is meant narrowly. The specific crimes listed in this portion of the statute include § 922(g) (criminalizing, among other things, the receipt and transportation of a firearm by certain persons), § 922(h) (prohibiting employees of certain persons from receiving, possessing, or transporting a firearm), and § 922(j) (proscribing, among other things, the receipt, possession, storage, or sale of a stolen firearm). By authorizing the seizure of a firearm that is either used in or *involved in* the underlying offenses, Congress recognized that many of the offenses covered by the statute would not rise to the level of actual "use" of a firearm. That is, if Congress believed that the underlying offenses, such as receipt, storage, and transpor-

tation of a firearm, constituted "use" of such weapons, it would not have needed to add the "involved in" language.

Another clause in § 924(d)(1) allows the seizure and forfeiture of a firearm "intended to be used" in a range of offenses listed in subsection (d)(3) of the statute. As this Court noted in *Bailey*, Congress's precise choice of words here reflects its recognition of the difference between firearms "used" in commission of an offense and those "intended to be used" in such a crime. *Bailey*, 516 U.S. at 146. When Congress apparently determined that "use" alone does not cover all the activities it wished to encompass, it carefully expanded the statutory language to include activities like "intent to use" a firearm or "involv[ing a firearm] in" a crime. In § 924(c)(1), by contrast, Congress's decision to include only the word "use"—without any of this expanding language—demonstrates its intent to define narrowly the conduct subject to the heavy mandatory prison terms required by that provision.

F. Giving "Use" Its Ordinary Meaning Accords With What This Court And The Government Have Long Recognized To Be The Core Purpose Of § 924(c)(1)

According to § 924(c)(1)'s original sponsor, Representative Poff, the statute's purpose was to "persuade the man who is tempted to commit a Federal felony to *leave his gun at home*." 114 Cong. Rec. 22,231 (1968) (emphasis added). The Court has repeatedly recognized the importance of Representative Poff's statement and has given it substantial weight when interpreting the meaning of § 924(c)(1). See *Muscarello*, 524 U.S. at 132; *Busic* v. *United States*, 446 U.S. 398, 405 (1980); *Simpson* v. *United States*, 435 U.S. 6, 13-14 (1978). The United States has also maintained that, "[t]o the extent any of the 1968 enactment history is relevant in construing the meaning of Section 924(c)(1), it is the statement of Representative Poff, the provision's sponsor, that should be given the greatest weight." Br. for the United

States at 9, *Smith* v. *United States*, 508 U.S. 223 (1993) (No. 91-8674); see also Tr. of Oral Argument at 38, *Smith*, *supra* ("[W]e think that the statute should be construed in accordance with that literal language, as the original sponsor of the statute indicated, Congressman Poff."); Br. for the United States at 28, *Bailey* v. *United States*, 516 U.S. 137 (1995) (Nos. 94-7448 and 94-7492) ("Representative Poff was referring to the 'uses' prong of the original Section 924(c)" in making his statement.).[7]

The Court looked to that purpose in determining the reach of § 924(c)(1)'s "carry" prong in *Muscarello*. *Muscarello* concerned whether an individual who brought a firearm to a drug transaction, but had the firearm locked in the glove compartment or trunk of his car, rather than on his person, had violated § 924(c)(1)'s prohibition against "*carr*[*ying*] a firearm" "during and in relation to * * * [a] drug trafficking crime." 18 U.S.C. § 924(c)(1)(A) (emphasis added). In holding that such actions were covered by the statute, the Court relied on the purpose of § 924(c)(1) to "'persuade the man who is tempted to commit a Federal felony to leave his gun at home.'" *Muscarello*, 524 U.S. at 132 (quoting 114 Cong. Rec. 22,231 (1968) (Rep. Poff)). The Court held that, "[f]rom the perspective of any such purpose," it would make little sense to decline to penalize one who carries a weapon in his car rather than on his person. *Muscarello*, 524 U.S. at 132-133.[8]

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[7] Other members of Congress also expressed that purpose elsewhere in the legislative history of § 924(c)(1). See, *e.g.*, 114 Cong. Rec. 22,243-22,244 (1968) (statutes would apply to "the man who goes out taking a gun to commit a crime") (Rep. Hunt); *id.* at 22,244 ("Of course, what we are trying to do by these penalties is to persuade the criminal to leave his gun at home") (Rep. Randall); *id.* at 22,236 ("We are concerned * * * with having the criminal leave his gun at home.") (Rep. Meskill).

[8] The history of § 924(c)(1) buttresses that understanding of the statute's purpose. In 1984, Congress amended § 924(c)(1) to prohibit the use of a firearm during or in relation to a federal crime of violence. The legislative history of this amendment makes clear that Congress's purpose

Here, in contrast, it would be entirely consistent with Congress's well-established purpose to recognize that there is no "use" under § 924(c)(1) when a defendant merely receives a firearm in a drug transaction. Individuals in Watson's position, who receive (or seek to receive) guns, are in fact much "less dangerous" than those who bring firearms with them to a narcotics transaction. *Muscarello*, 524 U.S. at 133. The former have no access to the weapon until the close of the transaction, and no control over whether the weapon is loaded or otherwise "available for use" after receipt. In some cases, the individual is arrested without even taking possession of the firearm. See, *e.g.*, *United States* v. *Montano*, 398 F.3d 1276, 1284 (11th Cir. 2005) (per curiam). In many others, including this case and *Westmoreland*, where an undercover government agent is on the other side of the transaction, the firearm is unloaded and inoperable, see 122 F.3d at 436—a situation vastly removed from the dangers that face law enforcement officers who deal with armed criminals, see *Smith*, 508 U.S. at 240. Even in transactions involving two private parties, the party who arrives, unarmed, with the drugs is unlikely to be the source of any danger. *Ibid.*

That is not to say, of course, that Congress could not enact a statute imposing punishment for seeking to obtain a gun with drugs. It is *not* at all unusual, however, for statutes to treat parties on different sides of distribution transactions differently. Compare, *e.g.*, 21 U.S.C. § 841 (criminalizing,

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was to deter the use of "dangerous weapon[s]" during or in relation to "extremely dangerous offenses." S. Rep. No. 98-225, at 312 (1983). By amending the statute to ensure that it reached all such uses of a firearm in relation to crimes of violence, Congress underscored its originally stated purpose to deter individuals from bringing a weapon into a situation where its presence could lead to an escalation in harm or violence. Such deterrence is not relevant when the individual charged under § 924(c)(1) does not have control over the weapon sufficient to raise fears of his using the weapon in a manner that would increase the likelihood of violence or destruction.

inter alia, the knowing distribution or dispensing of a controlled substance or a counterfeit substance), with *id.* § 844 (providing lesser penalties for possession of the same controlled substances). Claims that criminal statutes should be enlarged to achieve maximal possible deterrence contradict not only long-established rules of statutory interpretation and constitutional law (see pp. 39-43, *infra*), but also this Court's construction of this particular statutory provision in *Bailey*. In that case, involving defendants who, unlike Watson, *had* brought firearms to drug transactions, this Court expressly rejected arguments that Congress's general concern with the "combination" of guns and drugs warranted giving the word "use" in § 924(c)(1) a broad and unintended meaning. Here, the matter is even more clear-cut: Defendants who merely receive guns at the end of a drug transaction are not covered by Congress's stated purpose; they do not pose the dangers that concerned Congress; and they fall entirely outside any minimally acceptable reading of the language Congress enacted into law.

II. THE FIFTH CIRCUIT'S HOLDING FINDS NO SUPPORT IN "POLICY" CONSIDERATIONS OR IN *BAILEY*

Although the Fifth Circuit is not the only court to have held that a defendant's receipt of a firearm in exchange for drugs may be punished as "use" under § 924(c)(1), none of the decisions accepting that theory has suggested that this construction is required by—or even reconcilable with—the plain language of the provision Congress enacted. Indeed, two of the courts that have upheld convictions based on this theory, the First and Third Circuits, have explicitly recognized the difficulty of squaring it with the ordinary and natural understanding of "use." See pp. 12-13, *supra*.

Courts that have opted for the Government's broader and less plausible reading of § 924(c)(1) have instead relied on two reasons unrelated to the ordinary meaning of "use": (1)

policy considerations—*i.e.*, their professed inability to discern reasons for distinguishing between the conduct held punishable in *Smith* (using a gun to trade for drugs) and that here (receiving a gun in a barter transaction in exchange for drugs)—and (2) isolated language in the *Bailey* opinion they have read as indicating (or even requiring) that a defendant's receipt of a gun in a barter transaction be treated as "use" within the meaning of § 924(c)(1). Both of those rationales are mistaken.

A. Policy Considerations Cannot Override The Text Of A Criminal Statute And, In Any Event, Cut Against The Fifth Circuit's Holding

As explained in detail above, by punishing the "use" of a firearm "during and in relation to" a predicate drug offense, Congress made clear its intention to proscribe the active employment of guns but to exclude passive conduct such as the mere receipt of a firearm as payment in a drug transaction. Under these circumstances—whether or nor a court agrees with Congress's decision to limit a criminal statute's reach, enlargement by judicial interpretation is simply not an option. See *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 105 (1820) (Marshall, C.J.) (giving effect to narrow language, explaining that, even when Court could "conceive no reason why [defendant's acts] * * * should not be punished[,] * * * Congress has not made them punishable, and this Court cannot enlarge the statute."). See also pp. 39-43, *infra* (discussing rule of lenity).

Even if policy considerations were relevant, the distinctions between the two situations—actively trading a firearm for drugs and passively receiving one traded by someone else—are in fact real and substantial. In the former situation, the defendant has actively employed the firearm "during and in relation to" the drug offense; in the latter, he has not. Moreover, as noted above, Congress's premise in enacting § 924(c)(1) was that additional deterrence was

needed to persuade offenders to "leave their guns at home"—an approach that applies to individuals such as the defendant in *Smith*, but not to those such as Watson. See *Smith*, 508 U.S. 226.

Beyond that, the dangers posed by individuals who attempt to obtain guns are, as a matter of logic and practical experience, smaller than and different in kind from those posed by individuals who bring loaded guns with them—and smaller than those posed by carrying guns that, though operable and loaded, are intended for defensive use only. See *Bailey*, 516 U.S. at 141 (rejecting lower court test that had equated "'use[of] a gun with "put[ting] or keep[ing] the gun in a particular place from which one * * * can gain access to it if and when needed to facilitate a drug crime'") (quoting *Bailey*, 36 F.3d at 115); *Muscarello*, 524 U.S. at 133 (questioning whether "those who prepare, say, to sell drugs by placing guns in their cars are less dangerous * * * than those who carry handguns on their person"). Thus, "policy" considerations weigh *against*, rather than support, the interpretation of § 924(c)(1) adopted by the Fifth Circuit in this case.

B. *Bailey* Cannot Reasonably Be Read As Supporting An Expansive Construction of "Use"

Had *Smith* been this Court's only or final word on the firearm "use" proscribed under § 924(c)(1), the position taken by the Fifth Circuit might be understandable (though it still would be wrong). Indeed, as explained above (pp. 10-14, *supra*), the holding of *Smith* is sufficient in itself to require reversal here. But to whatever extent *Smith* left open the possibility of a broadly inclusive "interpretation" of "use," that door was firmly shut by *Bailey*. See *Stewart*, 246 F.3d at 731 (explaining that pre-*Bailey* decision sustaining conviction based on receipt of guns in an exchange was no longer good law); *Westmoreland*, 122 F.3d at 436 (predicting that Fifth Circuit would, in the wake of *Bailey*, disavow case law

treating receipt as punishable "use"). As these decisions emphasize, the *Bailey* opinion backed away from some of the broader language that had appeared in *Smith*. See, *e.g.*, *Stewart* 246 F.3d at 731 (describing *Bailey* as having limited *Smith* to the "particular use" at issue in that case) (quoting 516 U.S. at 140); see also *Bousley* v. *United States*, 523 U.S. 614, 620 (1998) (recognizing *Bailey* had changed the contours of what § 924(c)(1) was understood to have "made criminal"). Compare also *Smith*, 508 U.S. at 238 (indicating that "potential" active use and "facilitati[ve]" possession would likely be punishable) with *Bailey*, 516 U.S. at 144 (holding § 924(c)(1) "use" prohibition inapplicable in both circumstances). *Bailey*'s recognition that even dangerous possession may not be "use" for purposes of the statute and its affirmative holding that "active employment" must be present in all cases confirm that receipt of a gun through barter does not qualify as "use."

Remarkably, some lower courts that had equated gun receipt with "use" have not only adhered to that conclusion in the wake of *Bailey*, but have even suggested (as did the Government in opposing certiorari, see Br. in Opp. 5-6), that *Bailey* buttresses their interpretation. In particular, these courts have relied on *Bailey*'s statement (citing *Smith*) that "bartering * * * a firearm" constitutes punishable "use," as well as the opinion's passing reference to instances where a gun is an "operative factor" in drug dealing. See *Bailey*, 516 U.S. at 143. Neither of these aspects of *Bailey* lends any support to the decision below.

1. Bailey*'s Reference To "[B]artering * * * [A][F]irearm" Does Not Support Treating Receipt Of A Firearm As "Use"*

In *Bailey*, this Court "illustrat[ed] the activities that fall within the definition of 'use'" under § 924(c)(1). 516 U.S. at 148. "The active-employment understanding of 'use,'" it noted, "certainly includes brandishing, displaying, *bartering*,

striking with, and, most obviously, firing or attempting to fire a firearm." *Ibid.* (emphasis added). Thus, although *Bailey* lists "bartering * * * a firearm" as an example of a "use," it does so only insofar as that "bartering" constitutes "active employment"—*i.e.*, bartering *with* an item. Several lower courts have misconstrued this reference as establishing that anyone engaged in the *general activity* of bartering "uses" a gun, so long as the gun is somehow involved in the transaction. In so doing, those courts turn *Bailey*'s language—and, more importantly, its core holding—upside down. That construction of the phrase ignores the context in which this Court discussed the term, violates *Bailey*'s active-employment test, and runs afoul of the conventional understanding of the word "barter" as it was used in *Bailey*.

a. This Court's inclusion of "bartering * * * a firearm" in its list of "active employment" conduct is a clear reference to the Court's earlier decision in *Smith* and must be read accordingly. *Smith* presented the question whether a defendant who trades a gun to obtain drugs has "used" the gun. The Court held, over the dissent of Justice Scalia—joined by Justices Stevens and Souter—that the defendant had "used" a firearm under § 924(c)(1) because, "[b]y attempting to trade his [gun] for the drugs, [the defendant] 'used' or 'employed' it as an item of barter to obtain cocaine; he 'derived service' from it because it was going to bring him the very drugs he sought." 508 U.S. at 229. Two years later in *Bailey*, clarifying that "use" in § 924(c)(1) is limited to "active employment," the Court affirmed that the result in *Smith* "adhered to an active meaning" of "use," because the person bartering with a gun employs it. 516 U.S. at 148. In its extensive discussion of *Smith*, the Court in *Bailey* again referred to "bartering" in the context of the particular facts in *Smith*—bartering a firearm for drugs. See *ibid.* ("In *Smith*, it was clear that the defendant had 'used' the gun; the question was whether *that particular use (bartering)* came within the meaning of § 924(c)(1).") (emphasis added). In addition, the

Court made clear that *Smith* addressed only the "question whether the barter of a gun *for drugs* was a 'use.'" *Id.* at 143 (emphasis added). See *United States* v. *Cox*, 324 F.3d 77, 83 (2d Cir. 2003) (noting that receipt of a firearm during a drug transaction is a "quite distinct question" from that addressed in *Smith* and *Bailey*).

This Court's statement in *Bailey* that "bartering * * * a firearm" constitutes "active employment" immediately follows its discussion of *Smith*. The reference to bartering must therefore be read in its proper context, referring to the specific conduct at issue in *Smith*—bartering *with* a firearm in exchange for drugs. See *Montano*, 398 F.3d at 1283 ("*Smith* did not hold that bartering, in general, constituted 'use' of a firearm; instead, the opinion states that bartering *with a firearm* constitutes use"); see also *Stewart*, 246 F.3d at 732. The Court used the term "barter" in a similar fashion elsewhere in the *Bailey* opinion, referring to an offender who "barters *with* a firearm without handling it." 516 U.S. at 146 (emphasis added). When examined in context, *Bailey*'s reference to "bartering * * * a firearm" applies only to bartering a firearm in exchange for drugs. It cannot reasonably be applied to the very different circumstances of a defendant who receives a firearm as a result of a barter exchange.

b. The exceedingly broad interpretation of *Bailey*'s "bartering * * * a firearm" language is wholly at odds with the holding and central point of *Bailey*—that "use" prosecutions under § 924(c)(1) must be limited to defendants who "actively employ" firearms. As explained above (pp. 9-27, *supra*), however, mere receipt of a firearm is not "active employment" of that firearm. See *Stewart*, 246 F.3d at 731 ("[N]othing in a person's acceptance of a gun embodies the active employment demanded by the Court in *Bailey*."); see also *Montano*, 398 F.3d at 1284 (holding that a defendant who initiated drugs-for-gun exchange did not "actively employ" a firearm); *United States* v. *Layne*, 192 F.3d 556, 570 (6th Cir. 1999) (holding that even if defendant had

requested the firearm at issue, government failed to prove that defendant actively employed it). *Bailey*'s "bartering * * * a firearm" language must be construed in a manner consistent with the active employment test that this Court announced in the very same opinion. Although bartering a firearm for drugs meets *Bailey*'s active employment test, see *Bailey*, 516 U.S. at 148, a defendant who barters drugs—or any other item—in exchange for a gun cannot be said to have actively employed the gun merely by virtue of receiving it at the conclusion of the transaction.

Moreover, the approach taken by those courts of appeals that support the meaning of "use" adopted by the Fifth Circuit reflects a flawed reading of precedent and a mode of analysis long rejected by this Court. Fixating on the single reference to "bartering" within the *Bailey* decision, those courts "tak[e] * * * [an] unelaborated reference * * * out of context," and give that language "a meaning both unsupported by the holding and inconsistent with the spirit of [the] decision." *Bryson* v. *United States*, 396 U.S. 64, 70 n.9 (1969); see also *United States* v. *Flores-Montano*, 541 U.S. 149, 152 (2004) (chiding the court of appeals for seizing upon a single word in a prior decision to support the creation of a new legal standard); *Harbor Tug & Barge Co.* v. *Papai*, 520 U.S. 548, 557 (1997) ("The Court of Appeals majority interpreted the words 'particular employer' outside the limited discussion in which we used them and, as a result, gave the phrase a meaning opposite from what the context requires."); *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 540 (1985) ("[W]e think that the Court of Appeals misapprehended the significance of that phrase in the context in which it was used in [the prior decision]."); *United States* v. *Frady*, 456 U.S. 152, 164 (1982) ("[T]he Court of Appeals pointed to a single phrase to be found in our [earlier opinion]. * * * Seizing on this phrase, the Court of Appeals" reached an erroneous judgment regarding the correct standard of review.). As Justice Harlan cautioned in *Bryson*, extracting isolated words

or phrases from this Court's opinions is a perilous enterprise. Here, that flawed approach led lower courts to stretch § 924(c)(1)'s "use" prong well beyond its ordinary and natural meaning.

In attaching paramount significance to a single word in the *Bailey* opinion, those lower courts effectively read that decision to have announced two distinct rules—first, that any component of bartering (whether one actively gives or passively receives) necessarily constitutes "use" and, second, that "active employment" is a necessary element of "use." But the Court in *Bailey* announced only a single rule: "use" for the purposes of § 924(c)(1) requires "active employment." All language in *Bailey* must be understood in the context of that core holding, and efforts to construe language in the opinion differently fundamentally betray that holding as well as the logic behind it. As this Court explained, a defendant "uses" a firearm during and in relation to a drug transaction only when he actively employs that firearm, and such active employment may sometimes be found in barter transactions where, as in *Smith*, the defendant barters with a firearm. See *Bailey*, 516 U.S. at 143. It is simply incorrect, however, to conclude that any participation in a bartering transaction in which drugs and firearms are involved automatically places both parties in violation of § 924(c)(1) for having "used" a firearm in the transaction.

c. Courts that read *Bailey*'s "bartering * * * a firearm" language to encompass receipt make the additional mistake of conflating the general activity of "bartering" with the specific act of "bartering a firearm" or any other particular item. While the former, intransitive use of the word broadly encompasses the activities of all parties in a barter transaction, the latter, transitive sense of "bartering"—which this Court used in *Bailey*—is narrow, referring only to action by the person who is bartering away *something* (such as a firearm) in exchange for *something else*.

This critical distinction between the two senses of the term "bartering" can be illustrated by a simple example: If a farmer provides livestock to a merchant, who in return provides the farmer with flour and sugar, it would be proper to say that both the farmer and the merchant "barter." In addition, it would be appropriate to state that the farmer was "bartering the livestock." It would not be valid, however, to say that the farmer was "bartering the flour and sugar." That understanding of the term would run contrary to conventional usage. Similarly, the statement "I bartered a firearm today" can mean only one thing—the speaker exchanged his firearm for certain goods or services. That statement cannot reasonably be understood to mean that the speaker obtained a gun through a barter transaction. This commonsense definition of "barter" is supported by the opinions of this Court, which have repeatedly referred to bartering a particular item to mean *giving away* that object. See, *e.g.*, *United States* v. *Winstar Corp.*, 518 U.S. 839, 889 (1996) (plurality opinion); *Green* v. *United States*, 355 U.S. 184, 193 (1957); *Ill. Cent. R.R. Co.* v. *City of Chicago*, 176 U.S. 646, 659 (1900).

2. Bailey*'s "Operative Factor" Language Does Not Support The Decision Below*

In *Bailey*, this Court stated that "§ 924(c)(1) requires evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." 516 U.S. at 143. In that sentence, the term "operative factor" is defined by the "active employment" requirement: It is the defendant's "active employment" of the firearm that makes the firearm an "operative factor" in relation to the predicate offense. For instance, if the firearm is brandished, fired, or displayed, then it is actively employed by the defendant and thus rendered an operative factor in the predicate offense. The Sixth Circuit has made this very point: "When a firearm is 'displayed' in a drug trafficking offense, the firearm becomes an operative factor in relation to the predicate

offense." *United States* v. *Stotts*, 176 F.3d 880, 888 (1999). The converse understanding, in which the firearm's role as an "operative factor" *determines* whether it was "actively employed," would, in effect, contradict the very holding of *Bailey* and also render the "carry" and "possession in furtherance" portions of the statute superfluous.

Nevertheless, several of the courts of appeals have adopted this flawed interpretation. The Fifth Circuit, for example, first determined that firearms were an operative factor in the predicate offense and *then* concluded that the defendant necessarily actively employed those firearms: "By bartering drugs for firearms, [the defendant] 'actively employed' the firearms, because they were an 'operative factor' in the drug trafficking offenses. [The defendant] thus 'used' the firearms within the meaning of § 924(c)(1)." *Ulloa*, 94 F.3d at 956; see also *Cotto*, 456 F.3d at 30 (holding that the defendant "actively employed firearms by making them an operative factor in that crime").[9]

That reading of "operative factor" essentially miscasts *Bailey*'s requirement of "active employment" as one of "but-for" causation. Such an interpretation would not only nullify *Bailey*'s "active employment" understanding of "use," but also would swallow the "carry" and "possession in furtherance" prongs of the statute. If (1) the mere *presence* of something without which the drug transaction might not be completed renders that item an "operative factor"; and (2) anything considered an "operative factor" is *ipso facto* "used," then *Bailey*'s careful analysis of the term's limited meaning was a hollow exercise. Imagine, for example, that the defendant in *Bailey* always kept a gun in the trunk of his

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[9] Indeed, the Government has also focused on the term "operative factor" to the exclusion of the "active employment" requirement of *Bailey*. See Br. in Opp. 6; Br. for the United States at 14, *United States* v. *Erickson*, 134 F.3d 379 (9th Cir. 1997) (No. 97-35574) ("*Bailey* defines 'use' to mean 'operative factor.'") (citations omitted).

car while selling drugs and, though never removing or referring to the gun, would not sell drugs without its presence. Under the First and Fifth Circuits' analysis, since the defendant would never have engaged in drug trafficking unless the gun was invisibly present, it would be an "operative factor" in the offense and the defendant would have thus "used" a firearm in violation of § 924(c)(1). That result is entirely inconsistent with this Court's refusal in *Bailey* to equate possession of a firearm with "use" of a firearm under § 924(c)(1). See also *Jones*, 529 U.S. at 856 (citing *Bailey* as "rejecting the Government's argument that a gun is 'used' whenever its presence 'protects drugs' or 'emboldens' a drug dealer"). Following the 1998 amendment to § 924(c)(1), that hypothetical defendant's actions might, of course, qualify as possession "in furtherance." The First and Fifth Circuits' reading of *Bailey*'s "operative factor" language, however, would classify that behavior as "use," thereby rendering the "possession in furtherance" prong superfluous.

The lower courts' "operative factor" test not only violates *Bailey*, it also renders much of § 924(c)(1)'s "carry" provision superfluous. As this Court stated in *Muscarello*, *Bailey* limited "use" of a firearm to "active employment" because "'Congress * * * intended each term to have a particular, non-superfluous meaning.' A broader interpretation of 'use,' * * * would have swallowed up the term 'carry.'" 524 U.S. at 136 (citations omitted). The Court noted that "[c]arry also retains an independent meaning, for, under *Bailey*, carrying a gun in a car does not necessarily involve the gun's 'active employment.'" *Ibid.* In *Muscarello*, this Court found that the phrase "carries a firearm" in § 924(c)(1), in addition to criminalizing the "carrying of firearms on the person," "applies to a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies." *Id.* at 126-127. Thus, the two defendants in *Muscarello* who were transporting firearms in the trunk of

their car on the way to a drug-sale point, intending to steal drugs from the drug sellers, "carried" the firearms in violation of § 924(c)(1). Under the First and Fifth Circuit's "operative factor" test, however, since those defendants needed their weapons to steal the drugs from the drug sellers, and the defendants would not have committed the drug offense without their weapons, those weapons were an "operative factor" in the drug offense and thus "used" in violation of § 924(c)(1).

In fact, this Court squarely rejected the equivalent of the First and Fifth Circuit's "operative factor" test in *Bailey* itself. There, the D.C. Circuit had required the government to show (1) a "nexus * * * between a particular drug offender and the firearm," and (2) "that the gun facilitated the predicate offense in some way." *Bailey*, 36 F.3d at 108 (quotations omitted). The court used a proximity and accessibility test to determine whether the government had met that burden. *Id.* The government argued that it had "to present evidence only that the defendant possessed a firearm and that the firearm in some way facilitated the drug crime." *Id.* at 110. As this Court noted in *Bailey*, the government's interpretation of "facilitation" (and thus, "use") "include[d] even the action of a defendant who puts a gun into place to protect drugs or embolden himself." *Bailey*, 516 U.S. at 145. This Court rejected that definition of "use." *Ibid.*

The "facilitation" argument advanced by the government and adopted by the D.C. Circuit in *Bailey*, but rejected by this Court, is the same in substance as the "operative factor" test of the First and Fifth Circuits. Those courts have held, in so many words, that because the firearm (arguably) "facilitated" the offense—because the defendant received the firearm to close the transaction—it is an "operative factor" and thus "used." This interpretation is directly at odds with *Bailey*'s "active employment" requirement.

The only interpretation of *Bailey* consistent with both the holding of *Bailey* and the text of the statute is that there is no independent "operative factor" shortcut for establishing unlawful "use." A defendant may be prosecuted under § 924(c)(1)'s "use" prong only if he *actively employs* the firearm. Watson did not do that.

III. THE FIFTH CIRCUIT'S DECISION VIOLATES THE RULE OF LENITY AND IGNORES THE IMPORTANT CONSTITUTIONAL PRINCIPLES THAT REQUIRE AMBIGUITIES TO BE RESOLVED IN PETITIONER'S FAVOR

For the reasons set forth above, the reading of § 924(c)(1) adopted by the Sixth, Seventh, Eleventh and D.C. Circuits (Pet. 8)—under which receipt of a firearm alone, without active employment, may not be punished as "use"—is the only permissible construction of the statute. As this Court has long emphasized, the strong rule against "departure from statutory language," *Crandon* v. *United States*, 494 U.S. 152, 168 (1990) (quoting *Crooks* v. *Harrelson*, 282 U.S. 55, 60 (1930)), becomes a categorical prohibition when the law is one imposing criminal punishment and the argued-for departure from plain meaning would expand the statute's sweep. Thus, nearly two centuries ago, Chief Justice Marshall explained that even when the Court could "conceive no reason why [defendant's acts] * * * should not be punished[,] * * * Congress has not made them punishable, and this Court cannot enlarge the statute." *Wiltberger*, 18 U.S. (5 Wheat.) at 105.

But even if the reading we urge were not compelled by the statutory text, and was instead but one of several reasonable alternative interpretations, the Fifth Circuit's decision must still be reversed. It is well established that "ambiguous criminal statute[s]" must "be construed in favor of the accused." *Staples* v. *United States*, 511 U.S. 600, 619, n.17 (1994); see also *United States* v. *Granderson*, 511 U.S.

39, 54 (1994); *McNally* v. *United States*, 483 U.S. 350, 359-360 (1987) ("[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language."); *Leocal* v. *Ashcroft*, 543 U.S. 1, 10-12 & n.8 (2004) (finding the statute clear, but noting that "[e]ven if [it] lacked clarity * * *, we would be constrained to interpret any ambiguity in the statute in [the defendant's] favor"); *United States* v. *R.L.C*, 503 U.S. 291, 305 (1992) (plurality opinion) (holding that no "ambiguity survive[d]. If any did, however, we would choose the construction yielding the shorter sentence by resting on the * * * rule of lenity"); *Tanner* v. *United States*, 483 U.S. 107, 131 (1987) (finding statutory language unambiguous, but noting that "the Government has presented us with nothing to overcome our rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'") (quoting *Rewis* v. *United States*, 401 U.S. 808, 812 (1971)).[10]

As important as this rule of construction are the constitutional principles that underlie it. Cf. *Castillo* v. *United States*, 530 U.S. 120, 124, 131 (2000) (rejecting government's argument that machine gun use under § 924 should be treated as a sentencing factor, rather than an offense, citing the rule of lenity and noting that doing so would "give rise to significant constitutional questions"); *Jones* v. *United States*, 526 U.S. 227 (1999) (same). As the Court has explained, the rule against reading ambiguous provisions expansively is rooted in: (1) the principle, manifest in the text and structure of the Constitution, that "the legislature, not the Court, * * * is to define a crime, and

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[10] See also *Hughey* v. *United States*, 495 U.S. 411, 422 (1990) (rejecting the government's proffered interpretation as "implausible," but noting that "[e]ven were the statutory language * * * ambiguous, longstanding principles of lenity" would compel its rejection); *Crandon*, 494 U.S. at 168 ("To the extent that any ambiguity * * * remains, it should be resolved in the [defendant's] favor.").

ordain its punishment," *Wiltberger*, 18 U.S. (5 Wheat.) at 95; see *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812); *Bousley*, 523 U.S. at 620-621 ("[U]nder our federal system it is only Congress, and not the courts, which can make conduct criminal."); and (2) notions of "fair warning" that are at the heart of Due Process. See *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) (Holmes, J.); accord *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996); *Bouie* v. *City of Columbia*, 378 U.S. 347, 354 (1964) ("[U]nexpected and indefensible" constructions of statute violate Due Process.) (internal quotation marks omitted); cf. *Bousley*, 523 U.S. at 620 (holding that defendant who pleaded guilty to firearm "use" before *Bailey* could challenge conviction under 28 U.S.C. § 2255, noting "significant risk" that defendant was convicted of "an act that the law does not make criminal") (quoting *Davis* v. *United States*, 417 U.S. 333, 346 (1974)). See generally *United States* v. *Aguilar*, 515 U.S. 593, 600 (1995) (explaining that courts' "traditional * * * restraint in assessing the reach of a federal criminal statute [reflects] both * * * deference to the prerogatives of Congress, and * * * concern that a fair warning should be given to the world in language that the common world will understand") (citing *Dowling* v. *United States*, 473 U.S. 207 (1985) and *McBoyle*); *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988) (identifying "minimiz[ing] the risk of selective or arbitrary enforcement" as another "purpose[] underlying the rule of lenity"). "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States* v. *Bass*, 404 U.S. 336, 348 (1971). The rule "embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *Ibid.* (quoting Henry Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *Benchmarks* 196, 209 (1967)).

Each of those concerns would be implicated were the Court to embrace the Fifth Circuit's expansive and textually insupportable construction of § 924(c)(1). The penalties are substantial. No ordinary person would understand "use" to mean receipt in a barter transaction. Cf. *Zuni Pub. Sch. Dist. No. 89* v. *U.S. Dep't of Educ.*, 127 S. Ct. 1534, 1557 (2007) (Scalia, J, dissenting) ("Citizens arrange their affairs * * * on the basis of the law as it is written and promulgated."). Indeed, an individual who conscientiously reviewed the full range of materials on which courts rely in interpreting statutes—authoritative judicial construction, dictionaries, surrounding statutory provisions, and legislative history—would conclude that the statute does not reach individuals, like Watson, who never actively employed a gun and whose possession was at most fleeting and fully controlled by the government in order to minimize danger. Not only did the legislature understand the differences between firearm "use" and terms such as "possession," "receipt," "acquisition," "intent to use," and "involvement"—all of which appear in surrounding provisions—but Congress's adherence to the settled understanding of "use" came after specific consideration of more expansive alternative approaches. See H.R. Rep. No. 105-344, at 14 (noting that the Justice Department had favored alternative legislation, H.R. 810, which would have amended § 924(c)(1) by deleting "use" and "carry" and replacing them with a single "possession" proscription); *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) (explaining that the "significant expansion of the law's coverage [sought by the government] must come from Congress, and not from the courts"). Finally, the power of government agents in cases like this one to control whether unloaded guns are handed over—and to steer individuals toward using drugs as currency instead—highlight that "arbitrary enforcement," *Kozminski*, 487 U.S. at 952, is a real and serious danger.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 2007